



The History and Status of the International Criminal Court

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UNTIL FAIRLY RECENTLY, INTERNATIONAL CRIMINAL COURTS have been established entirely on an *ad hoc* basis. Probably one of the earliest and most famous such court was that which convened to try Peter von Hagenbach in the town of Breisach in 1474. He was acting as governor of the city on behalf of the Duke of Burgundy to whom it had been pledged by the Archduke of Austria as security for a loan. In that capacity, von Hagenbach was personally responsible for innumerable acts of murder, rape, illegal taxation, and illegal confiscation of property. The victims included merchants from Swiss towns passing through the pledged area while travelling to and from Frankfurt. Finally, his German mercenaries revolted and joined the citizens of Breisach in seizing von Hagenbach and putting him on trial. He was tried by a court of twenty-eight judges, eight from Breisach and two from each of the other towns, German and Swiss, with respect to which von Hagenbach had exercised his powers over their inhabitants. Despite his plea that he had only obeyed the orders of his master, the Duke, he was found guilty, deprived of his knighthood, and executed.¹

International conferences on the law of war were convened in Brussels in 1874, in The Hague in 1899 and 1907, and in Geneva in 1929, 1945 and 1974.

At none of these conferences was there even a suggestion made that an international criminal court be established.

In 1919, the Preliminary Peace Conference of Paris created a Commission on the Responsibilities for the War, a sub-commission of which made a list of thirty-two specific war crimes.² However, when ultimately drafted, the provisions of Article 14 of the Treaty of Versailles³ with respect to the future establishment of a Permanent Court of International Justice did not contemplate that the Court would enjoy any criminal jurisdiction.⁴ Paragraph 25 of the Annex to Article 50 of the Treaty of Versailles, dealing with the Saar Basin, provided for the establishment by the Governing Commission of a "civil and criminal court" which was to hear appeals from the decisions of the then existing courts of the Saar Basin. The Governing Commission was responsible "for settling the organisation and jurisdiction of the said court" and "Justice was to be rendered in the name of the Governing Commission."⁵ Whether this can be called an "international criminal court" is doubtful.

What is sometimes considered to be the first *ad hoc* international criminal court of modern times was the court created by Article 227 of the Treaty of Versailles.⁶ It provided as follows:

The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.

A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.

In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed.

The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.

As the Netherlands had earlier granted the ex-Kaiser asylum and refused the demands for his extradition made by France and Great Britain, he was never tried.⁷

Articles 228–230 of the Treaty of Versailles provided for the trial before military tribunals of the Allied and Associated Powers of persons “accused of having committed acts in violation of the laws and customs of war”; for the handing over by the German Government of persons accused of having committed such acts; and for the furnishing by the German Government of all appropriate documents and information. These trials were, of course, to be conducted by national, not international, courts. Because of the political situation in Germany, the Allies agreed that the German Supreme Court of Leipzig would try these cases. This proved to be a fiasco and established beyond doubt that trial by a defeated nation of its own personnel charged with the commission of war crimes against enemy personnel or property during the hostilities was not a viable solution to the problem.

Part I of the Treaty of Versailles constitutes the Covenant of the League of Nations.⁸ The Council of the League established a Committee of Jurists which drafted a Statute of the Permanent Court of International Justice.⁹ Article 34 of that Statute provided that only “States or Members of the League of Nations can be parties to cases before the Court.” Obviously, such a limitation precluded criminal trials.

While it did not provide for the establishment of an international criminal court, it is not possible to omit reference to the Treaty of Paris (also known as the Kellogg-Briand Treaty),¹⁰ which was executed on August 27, 1928. This Treaty provided:

Article I

The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

Article II

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatsoever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

As we shall see, this Treaty served as the substantive law basis for findings with respect to crimes against peace reached by the post-World War II courts at Nuremberg and Tokyo.¹¹

During the course of World War II (1939–1945), the Allied Powers repeatedly stated that at the conclusion of hostilities (which they obviously assumed would be in their favor) there would be retribution for the violations of the law of war being committed by the Nazis in all occupied territories. Thus, in response to a statement of condemnation made by President Roosevelt on October 25, 1941, while the United States was still neutral, Winston Churchill, Prime Minister of Great Britain said: “Retribution for these crimes must henceforward take its place among the major purposes of the war.”¹² The Declaration of St. James (January 13, 1942), to which many of the Allied Powers were Parties, provided:

Whereas Germany, since the beginning of the present conflict which arose out of her policy of aggression, has instituted in the occupied countries a regime of terror characterised amongst other things by imprisonment, massed expulsions, the execution of hostages and massacres....

....

(3) place among their principal war aims, the punishment, through the channel of organised justice, of those guilty of or responsible for those crimes, whether they have ordered them, perpetrated them or participated in them,

(4) resolve to see to it in a spirit of international solidarity, that (a) those guilty or responsible, whatever their nationality, are sought out, handed over to justice and judged, (b) that the sentences pronounced are carried out.¹³

In November 1941, an unofficial body known as the Cambridge Commission on Penal Reconstruction and Development engaged in the task of collecting information on the subject of war crimes. This body was of the opinion that

wherever possible, municipal law should be the system of law applicable to the trial of war criminals, but where this was not possible, it was suggested that the general principles of international law should be applied . . . It was evident that there would be a residue of cases outside the scope of the municipal courts and to deal with these cases some members recommended the formation of an international criminal court; others, however, did not think the time was ripe for the creation of such a court.¹⁴

Another unofficial body, the London International Assembly, created to make recommendations to the Allied Commission, established a commission

to study the question of the institution of an international criminal court. After lengthy discussion, the Assembly concluded that

the jurisdiction of an international court should be defined in the widest possible manner and should cover crimes hitherto unlisted as war crimes, such as the crime of aggression, but there were some categories of crimes which could definitely be considered to be within its jurisdiction, namely:

(1) crimes in respect of which no national court had jurisdiction (e.g. crimes committed against Jews and stateless persons and possibly against Allied nationals in Germany); this category was meant to include offences subsequently described as "crimes against humanity."

(2) crimes in respect of which a national court of any of the United Nations has jurisdiction, but which the State concerned elects, for political or other reasons, not to try in its own courts.

(3) crimes which have been committed or taken effect in several countries, or against the nationals of different countries.

(4) crimes committed by heads of State.¹⁵

In June 1945, when the war in Europe had, for all practical purposes, come to an end, the Allied nations drafted the United Nations Charter.¹⁶ The only international court that was established by that Charter was the International Court of Justice. Article 34(1) of the Statute of that Court limits its jurisdiction to States.¹⁷

As early as January 1945, France, Great Britain, the Soviet Union, and the United States began negotiations which would lead to the trial of those Nazis designated as major war criminals. These negotiations culminated in an Agreement in London on August 8, 1945, to which was attached a Charter of the International Military Tribunal.¹⁸ Of particular interest insofar as this study is concerned is the resolution of the jurisdiction of the Tribunal. Article 6 of the Charter states:

The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) *Crimes Against Peace*: namely, planning, preparation, initiation or waging a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) *War Crimes*: namely, violations of the laws and customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) *Crimes Against Humanity*: namely, murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war; or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

It will be noted that, although this Agreement and Charter established an international criminal court, as with prior efforts it was an *ad hoc* court created for a specific limited purpose and its jurisdiction was restricted to the trial of individuals alleged to have committed major crimes connected with World War II.¹⁹

The events following upon the breakup of the Soviet Union once again brought to the fore the need for an international criminal court. The United Nations Security Council responded by deciding that

an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991

and the Secretary-General was directed to submit a specific proposal for the establishment of such a Tribunal.²⁰ He did so,²¹ and his proposal was adopted by the Security Council.²² Article 1 of the Statute of the International Tribunal for the Former Yugoslavia provides:

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

This Tribunal was given jurisdiction over violations of the grave breaches provisions of the 1949 Geneva Conventions (Article 2), violations of the laws and customs of war (Article 3), genocide (Article 4), and crimes against humanity (Article 5). Unlike the Statute of the International Court of Justice, this Tribunal was specifically given "jurisdiction over natural persons."²³ Although at this point we still do not have a true permanent International Criminal Court, it is apparent that we are moving towards that goal.

While the International Law Commission (ILC) had early decided that to include the law of war on its original agenda would indicate a belief in the weakness of the United Nations, it had no such qualms with respect to drafting a convention establishing an international criminal court which would have jurisdiction, among others, to try war crimes. However, this item was apparently very low on its agenda and for years the ILC did little more than designate rapporteurs or working groups whose products rarely received deep consideration. Finally, the report of its forty-fourth session (1992) included what was designated as a "Draft Code of Crimes against the Peace and Security of Mankind." The General Assembly of the United Nations then adopted a resolution inviting States to submit to the Secretary-General comments on the ILC's draft report on the subject of international criminal jurisdiction, and requested the ILC to elaborate a draft statute for an international criminal court as a matter of priority.²⁴ In accordance with that mandate of the General Assembly, at its next (forty-fifth) session the ILC reconvened a working group for a draft statute on an international criminal tribunal. The ILC's report on its forty-fifth session (1993) included a "Draft Statute for an International Criminal Tribunal."²⁵ For the first time, offenses other than war crimes were included within the jurisdiction of an International Criminal Tribunal; and the Tribunal was limited neither in duration, nor by the nationality of the accused, or the location at which the alleged crime occurred.

The ILC's Draft Statute provided for a permanent Tribunal of 18 judges to be elected by the Parties to the Statute (no two of whom could be from the

same State) and to sit in a place to be determined. Its jurisdiction included: genocide and the related crimes set forth in Articles II and III of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide;²⁶ grave breaches of the four 1949 Geneva Conventions²⁷ and the 1977 Protocol I Additional to those Conventions;²⁸ violations of the 1970 Convention for the Suppression of the Unlawful Seizure of Aircraft;²⁹ the crimes set forth in Article 1 of the 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;³⁰ apartheid and the related crimes set forth in Article 2 of the 1973 International Convention on the Prevention and Suppression of the Crime of Apartheid;³¹ the crimes set forth in Article 2 of the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents;³² hostage-taking and related crimes as set forth in the 1979 International Convention Against the Taking of Hostages;³³ and the crimes set forth in Article 3 of the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation³⁴ and in Article 3 of the 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf.³⁵ The Tribunal would also have jurisdiction over cases referred to it by the Security Council of the United Nations (Article 25) and in cases where the affected State or the State in which the accused is found agrees to the exercise of such jurisdiction (Article 26).³⁶

The ILC draft pursued its way through the agencies of the United Nations, receiving the comments of various States, and concluding with the Report of the Preparatory Committee on the Establishment of an International Criminal Court that became the Working Paper for a Conference of Plenipotentiaries on the Establishment of an International Criminal Court which was to meet in Rome in June 1998.³⁷ Article 5 of that Report is entitled Crimes within the jurisdiction of the Court. It listed various options for the crimes of genocide, aggression, war crimes, crimes against humanity, and a blank fifth offense.³⁸ There is an N.B. which states that "once a decision is made as to which crimes should be included in the draft Statute, the paragraphs of this introductory article should be adjusted and the subsequent provisions placed in separate articles and numbered accordingly." The draftsmen then proceeded to do just that, providing in many cases numerous alternative draft provisions for the listed offenses. A discussion of these lengthy provisions has not been included herein because the provisions selected by the Diplomatic Conference have adopted, rejected, superseded, or replaced the offenses specified in the Preparatory Committee's Report.

The Diplomatic Conference met in Rome from June 15 to July 17, 1998, and after a month of heated arguments, disputes, and disagreements, drafted the Rome Convention for the Establishment of an International Criminal Court.³⁹ Understandably, the question of the extent of the jurisdiction to be exercised by the Court constituted one of the major problems to confront the Conference.⁴⁰ However, there were also other problems which caused considerable controversy and the solution of which will probably mean that a number of States, including the United States, will not become Parties to this Statute. All in all, the Statute of the Court includes 128 articles covering well over 100 pages!⁴¹

Perhaps basic to the entire matter is Article 1, which states:

An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdiction. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Article 2 provides that the relationship of the International Criminal Court to the United Nations will be based on an agreement between the Assembly of States Parties to the Statute⁴² and the United Nations.⁴³ Article 3 provides that The Hague shall be the seat of the Court but that it may sit elsewhere as provided in the Statute.⁴⁴

Part 2 (Articles 5–21) is the core of the Statute. It is entitled Jurisdiction, Admissibility and Applicable Law. In successive articles, the Statute enumerates and amplifies the crimes which are within the jurisdiction of the Court. Article 5 lists those crimes as (a) genocide; (b) crimes against humanity; (c) war crimes; and (d) the crime of aggression.⁴⁵ By becoming a Party to the Statute, a State accepts the jurisdiction of the Court with respect to the crimes enumerated. For the Court to exercise jurisdiction, an alleged crime must (a) be referred to the Prosecutor by a State Party, or (b) by the Security Council, or (c) must result from an investigation initiated by the Prosecutor.⁴⁶ With respect to (a) and (c), the Court only has jurisdiction if the conduct in question was committed on the territory of a State Party, or on board a vessel or aircraft registered in a State Party; or, the accused is a national of a State Party.⁴⁷

Part Three of the Statute (Articles 22–33) is entitled "General Principles of Criminal Law." It includes such long-standing and non-controversial provisions as *nullum crimen sine lege* (Article 22), *nulla poena sine lege* (Article 23),

non-retroactivity *ratione personae* (Article 24); grounds for excluding criminal responsibility (Article 31); etc.

There were two provisions included in the 1945 London Charter⁴⁸ which proved to be of major importance during the war crimes trials conducted after World War II: Article 7, providing that the official position of the accused was not a defense; and Article 8, providing that the fact that the accused acted pursuant to the orders of a superior was likewise not a defense.⁴⁹ The provisions with respect to the responsibility of the superior were apparently non-controversial and will be found reiterated in Articles 87 and 88 of the 1977 Protocol I Additional to the 1949 Geneva Conventions.⁵⁰ Comparable provisions are to be found in Article 27 of the Statute entitled "Irrelevance of Official Capacity" and in Article 28 thereof entitled "Responsibility of Commanders and Other Superiors." However, perhaps because of fear of its effect on discipline, several prior attempts to include a provision denying "superior orders" as a defense were rejected by Diplomatic Conferences.⁵¹ Article 33 of the Statute approaches the subject, but cautiously. After a first paragraph which flatly sets forth the rule, three subparagraphs place what appear to have been intended as limitations on that provision: (a) the accused must have been "under a legal obligation to obey orders of the Government or the superior in question";⁵² (b) the accused did not know that the order was unlawful; and (c) the order was not manifestly illegal.⁵³

Strange to relate, the very important provisions concerning the composition of the Court do not appear until Part 4 of the Statute in Articles 34–52. There are to be eighteen judges,⁵⁴ not more than one from any State, and all having specified qualifications. With a minor exception, the term of office is nine years and judges are not eligible for reelection. The organs of the Court include the Presidency (Article 38); the Chambers (an Appeal Chamber composed of the President and four other judges, a Trial Division composed of not less than six judges, and a Pre-Trial Division also composed of not less than six judges) (Article 39); an Office of the Prosecutor (Article 42); and the Registry (Article 43).

Of major importance to any judicial body are its rules of procedure and its rules of evidence. The Statute does not specify who is to draft these rules, so presumably that will be a task for the Court. However, Article 51 provides that such rules enter into force only after they have been approved by a two-thirds majority of the Assembly of States Parties.⁵⁵ It can be anticipated that this will present a major problem.

Part 5 of the Statute (Articles 53–61) is concerned with "Investigation and Prosecution." There is little that is novel in this area. The Prosecutor

investigates; he determines whether there is evidence warranting prosecution; if he determines that there is not such evidence, he notifies the Pre-Trial Chamber and the State which referred the case; the State which referred the case (or the Security Council if it was the complainant) may request a review of the Prosecutor's decision by the Pre-Trial Chamber.⁵⁶

The Statute contains a number of provisions for the protection of individuals. Thus, Article 55 has provisions protecting persons during the investigation of an alleged offense; and Article 66 specifies that "Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law."⁵⁷ As Article 63 provides that "The accused shall be present during the trial," there are to be no trials *in absentia*.⁵⁸

Part 6 (Articles 62–76) is concerned with the trial proper. It is here that we find provisions concerning the presence of the accused at the trial, the presumption of innocence, the rights of the accused, the protection of victims and witnesses, rules of evidence, etc.

Part 7 (Articles 77–80) deals with penalties. Paragraphs 1(a) and (b) of Article 77 are rather peculiar. Paragraph 1(a) provides that the Court may impose "Imprisonment for a specified number of years, which may not exceed a maximum of 30 years." However, paragraph 1(b) provides that the Court may impose "A term of life imprisonment when justified by the extreme gravity of the crime"! That article also contains provisions for fines and for the "forfeiture of proceeds, property and assets derived from the crime."

Part 8 (Articles 81–85) is concerned with appeals. Article 81(1)(a) empowers the Prosecutor to appeal, apparently even from an acquittal, on the ground of procedural error, of error of fact, or of error of law. Paragraph 1(b) of that Article authorizes the convicted person "or the Prosecutor on that person's behalf" to appeal not only on those same grounds but also on "Any other ground that affects the fairness or reliability of the proceedings or decision." Article 82 refers to appeals against a number of other types of decisions which may be made during the course of the proceedings.

Part 9 (Articles 86–102) of the Statute is entitled "International Cooperation and Judicial Assistance." It can be anticipated that this is an area where difficulties and controversies will arise. Thus, Article 89 requires States Parties to "comply with requests for arrest and surrender." As this requirement is stated to be subject to the procedure under the requested State's national law, past experience has demonstrated the numerous problems to be encountered in this area even where an extradition treaty is the basis for the request.⁵⁹

Part 10 (Articles 103–111) is concerned with the problem of the enforcement of sentences. These provisions are somewhat similar to the provisions in

this regard contained in the Statute for the Yugoslav Court. Article 103 provides that States may indicate their willingness to accept convicted persons for incarceration and the conditions under which this will be accomplished.

Part 11 (Article 112) establishes the Assembly of States Parties and enumerates the functions of this body. They are, of course, solely administrative in nature as are the provisions of Part 12 (Articles 113–118), which are concerned with financing. However, the Assembly of States Parties is the body which will be responsible for the external matters relating to the Court. It is the body which, pursuant to Article 121, will convene in seven years to consider amendments to the Statute. Only States Parties will have a vote at that conference.

Part 13 (Articles 119–128) are, for the most part, the usual administrative details with respect to international agreements. It is here that we find one of the provisions of the Statute to which the United States takes exception, and one of the several reasons why it will, in all probability, not ratify the Statute. This provision is contained in Article 120, which provides that "No reservations may be made to this Statute." Such a provision has caused the United States to withhold ratification of several other conventions and will undoubtedly play a major role in its failure to ratify the Statute of the International Criminal Court.

It is obvious that there are good provisions and provisions of dubious value in the 1998 Statute of the International Criminal Court. It is the opinion of the present author that the good far outweigh the bad and that the Court should be permitted to function for a period during which improper provisions and necessary but missing provisions will be identified and the Assembly of States Parties will then be in a position to evolve what a two-thirds majority thereof considers to be a more perfect Statute.

Notes

1. II GEORG SCHWARZENBERGER, *INTERNATIONAL COURTS, ARMED CONFLICT* 462–466 (1968). Although the trial took place before the outbreak of war between the Archduke of Austria and his Allies against the Duke of Burgundy, the case had all the characteristics of an *ad hoc* international war crimes court, with the accused fruitlessly asserting the now famous defense of "superior orders."

2. HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 34–35 (1948) (hereinafter cited as War Crimes Commission).

3. Treaty of Versailles, 2 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776–1949 at 43, 52 (Charles I. Bevans ed., 1969); II MAJOR PEACE TREATIES OF MODERN HISTORY, 1648–1967, at 1265, 1279 (Fred L. Israel ed., 1967).

4. This Article appears in the portion of the Treaty concerned with the Covenant of the League of Nations.

5. 2 Bevens, *supra* note 3, at 73; II Israel, *supra* note 3, at 1306.

6. 2 Bevens, *supra* note 3, at 136–137; II Israel, *supra* note 3, at 1389.

7. JAMES F. WILLIS, PROLOGUE TO NUREMBERG 98–112 (1982).

8. 2 Bevens, *supra* note 3, at 48; IV Israel, *supra* note 3, at 1274.

9. 1 MANLEY O. HUDSON, INTERNATIONAL LEGISLATION 530 (1931).

10. 2 Bevens, *supra* note 3, at 732; IV Israel, *supra* note 3, at 2393.

11. Nazi Conspiracy and Aggression: Opinion and Judgment 48 (GPO, 1947); Report of Robert H. Jackson, United States Representative to the International Conference of Military Trials, Doc. LX, at 422, 423 (1949) [hereinafter Jackson]; 1 The Tokyo Judgment 46 (B.V.A. Roling & C.P. Ruter eds., 1977). However, it did not prevent a series of wars such as that between Bolivia and Paraguay (the Chaco War); the Italo-Abyssinian War; etc.

12. WAR CRIMES COMMISSION, *supra* note 2, at 88. See, for example, the Moscow Declaration of 1945, *op. cit.*, at 107.

13. WAR CRIMES COMMISSION, *supra* note 2, at 89–90.

14. WAR CRIMES COMMISSION, *supra* note 2, at 95.

15. WAR CRIMES COMMISSION, *supra* note 2, at 102–103.

16. 3 Bevens, *supra* note 2, at 1153.

17. *Ibid.* at 1179, 1186.

18. 59 Stat. 1544; Jackson, *supra* note 11, at 420 and 422 (1949); 3 Bevens, *supra* note 2, at 1238 and 1240.

19. The Charter of the International Military Tribunal for the Far East, established by proclamation issued on January 19, 1946, by General Douglas MacArthur as Supreme Commander for the Allied Powers (SCAP), while differing in wording, provided for a similar jurisdiction. See Article 5, Charter of the International Military Tribunal for the Far East, Department of State, Publication 2613, Trial of Japanese War Criminals 39, 40 (1946); 4 Bevens, *supra* note 1, at 20.

Once again persons who were charged with having committed ordinary war crimes were to be and were tried by national courts both in Europe and in Asia.

20. S/RES 808 (1993), Feb. 22, 1993.

21. S/25704, May 3, 1993; 32 I.L.M. 1163 (1993).

22. S/RES 827 (1993), May 25, 1993; 32 I.L.M. 1203 (1993).

23. 32 I.L.M. 1194, (S/RES 955 (1994), Nov. 8, 1994. S/RES/955, Nov. 8, 1994, 33 I.L.M. 1600 (1994), created a somewhat similar Tribunal for Rwanda.)

24. UNGA/RES 47/33 Nov. 25, 1992. The draft Final Act of the Rome Conference (A/CONF.183/2/Add.1, at 168) contained the following summary of the actions of the General Assembly in this regard:

3. Previously, the General Assembly, in its resolution of 44/39 of 4 December 1989, had requested the International Law Commission to address the question of establishing an international criminal court; in resolutions 45/41 of 28 November 1990 and 46/54 of 9 December 1991, invited the Commission to consider further and analyse the issues concerning the question of an international criminal jurisdiction, including the question of establishing an international criminal court; and in resolutions 47/33 of 25 November 1992 and 45/31 of 9 December 1993, requested the Commission to elaborate the draft statute for such a court as a matter of priority.

It appears obvious that the General Assembly was far more interested in the establishment of an international criminal court than was the International Law Commission!

25. General Assembly, Official Records, Forty-eighth Session, Supplement No. 10 (A/48/10), paragraphs 75 *et seq*; 33 I.L.M. 253 (1994).

26. 78 U.N.T.S. 277; 151 B.F.S.P. 683; *THE LAWS OF ARMED CONFLICT* 231 (Dietrich Schindler & Jifi Toman, eds., 3rd ed. 1988).

27. 6 U.S.T. 3114–3695; T.I.A.S., 3362–4465; 75 U.N.T.S., 31–468; Schindler and Toman, *supra* note 26, at 373–594.

28. 72 AM. J. INT'L L. 457–509 (1980); Schindler & Toman, *supra* note 26, at 621–718.

29. 860 U.N.T.S. 105; 10 I.L.M. 133 (1971).

30. 974 U.N.T.S., 177; 10 I.L.M., 1151 (1971). For some strange reason, the supplement to this Convention, the 1988 Protocol for the Suppression of Violence at Airports Serving Civil Aviation 27 I.L.M. 627 (1988), was not included.

31. UNGA/RES 3068 (XXVIII); 13 I.L.M., 51–57 (1973).

32. UNGA/RES 3166 (XXVIII); 13 I.L.M., 41–49 (1974).

33. UNGA/RES 34/146 (XXXIV); 18 I.L.M., p. 1456 (1979).

34. 27 I.L.M., 672 (1988);

35. 27 I.L.M., 685 (1988).

36. It will be noted that neither crimes against humanity nor crimes against peace (nor crimes involving the environment or cultural objects) were included within the jurisdiction of the Tribunal. However, Article 27 provided that a person could be tried for an act of aggression if the Security Council “has first determined that the State concerned has committed the act of aggression which is the subject of the charge.”

37. A/CONF.183/2/Add. 1, April 14, 1998.

38. Parenthetical provisions indicate the possibility of including: crimes of terrorism; crimes against United Nations and associated personnel; and crimes involving the illicit traffic in narcotic drugs and psychotropic substances.

39. A/CONF.183/9, July 17, 1998. The vote on the final Draft Convention was 120 for and 7 against, the latter including Algeria, China, Iraq, Israel, Libya, Qatar and the United States—a strange grouping!

40. One problem that arises is whether the International Criminal Court will have jurisdiction over all international crimes listed to the exclusion of all other such courts, including those already in existence (such as the courts already established with respect to Yugoslavia and Rwanda) or will *ad hoc* international criminal courts continue to be established for specific matters. See Christopher Staker, *Will There be a Role for Other International Criminal Courts after the Establishment of an ICC?* INTERNATIONAL LAW FORUM 16 (Zero Issue, 1998).

41. The Statute will be found in A/CONF.183/9, July 17, 1998. (It can also be found at: <http://www.un.org/icc/part1.htm> (through part 13.htm)).

42. The composition and activities of the Assembly of States Parties to the Statute are set forth in Article 112 of the Statute.

43. This is a far cry from the conclusions reached at a symposium conducted by the United States Institute of Peace in 1996 and which caused the present author to write a letter to the symposium director that included the following paragraph:

... I heard nothing but proposals which would, in effect, make the International Criminal Court a pawn of the Security Council. The Security Council would determine who should be tried; the Security Council would indict; the Security Council would instruct the International Criminal Court how to proceed; the Security Council would

review the acts of the Court, etc., etc. In other words there would be a completely politicized criminal court dependent entirely on the will and the whims of the Security Council—which, in effect, means on the will of any single nation exercising the veto power, or even on the negative votes of any nine members of that body. This is not my idea of an *independent International Criminal Court*; and I am sure that States would be reluctant to release any of their criminal jurisdiction to such a court.

I received no answer to that letter.

44. Article 4(2) provides that the Court “may exercise its functions, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.”

45. Articles 6 enumerates five acts constituting genocide; Article 7 enumerates eleven acts constituting crimes against humanity; and Article 8 enumerates eight acts constituting violations of the grave breaches provisions of the 1949 Geneva Conventions and an additional twenty-six acts which also constitute war crimes. Extensive attempts to define aggression proved unsuccessful. Concerning this situation, an “Analysis of the Statute of the International Criminal Court,” apparently prepared by one of the U.S. representatives at Rome, but not otherwise identified, listing objectives of the United States which were not achieved, states:

Inclusion of aggression in the statute, with a proviso “activating” the crime once an acceptable definition has been arrived at and included in the Statute as a result of a Review Conference under Article 123 and an amendment to the Statute pursuant to Article 121, is in direct contravention of the consensus clearly demonstrated during the debates—that aggression should not be included if not adequately defined.

(The present author was unable to identify any such “proviso” in the Statute and assumes that it was a separate action of the Conference.)

Article 8(c) to (f) relate to crimes committed during armed conflicts not of an international character.

46. See Articles 12 and 13 of the Statute. Under Article 12(3) a State which is not a Party to the Statute may accept the jurisdiction of the Court. This is one of the areas to which the United States strongly objects as it took the position that the Statute should not apply the jurisdiction of the Court to States not Parties to the Statute on the theory that a treaty does not create either obligations or rights for a non-Party.

The United States also objected strongly to the provisions of Articles 13 and 15 of the Statute which permit the Prosecutor to initiate investigations on his own motion. It fears that he will be subjected to the pressure of human rights organizations to institute proceedings in cases which do not comprise crimes of concern to the international community.

47. Article 12 of the Statute. Because of the fact that American soldiers are stationed in so many different areas, and the fear that they would be subjected to politically motivated charges, the United States sought, unsuccessfully, the right to veto the prosecution of American citizens. While there was merit to its concern, every nation would have sought entitlement to the same right and the entire idea of an International Criminal Court would have been nullified.

48. See note 18, *supra*.

49. These provisions will be found in Principles III and IV, respectively, of the International Law Commission’s Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal. 44 AM. J. INT’L L. Supp. 146 (1950).

50. See note 28, *supra*.

51. See Howard S. Levie, *The Rise and Fall of an Internationally Codified Denial of the Defense of Superior Orders*, 30 REVUE DE DROIT MILITAIRE ET DE DROIT DE LA GUERRE 183 (1991); reprinted in LEVIE ON THE LAW OF WAR 269 (Vol. 70, International Law Studies, 1998).

52. It has probably always been held that a person is legally obligated to obey the orders of his government or a superior unless the order was manifestly illegal. See, e.g., The Dover Castle Case in MULLINS, THE LEIPZIG TRIALS 107 (1921).

53. See note 52, *supra*. Paragraph 2 of Article 33 specifically states that "orders to commit genocide or crimes against humanity are manifestly illegal."

54. There is a procedure in Article 36(2) for increasing this number.

55. One rather unusual rule which is included in Article 50 of the Statute itself is that while the official languages of the Court are Arabic, Chinese, English, French, Russian and Spanish, the working languages of the Court are English and French.

56. Under certain circumstances, the Pre-Trial Chamber may review the Prosecutor's decision on its own initiative. See Article 53(3)(b).

57. Article 67 sets forth a number of additional rights of the accused. A rather unusual provision for an international criminal court is to be found in Article 72, "Protection of national security information."

58. However, paragraph 2 of that article does authorize the Court to remove an accused from the courtroom if he disrupts the proceedings. Even then, he must be allowed to view the trial from outside and to communicate with his counsel.

59. It should be noted that Article 101 makes the rule of specialty applicable to cases of the surrender of an individual to the Court for trial.